Supreme Court, U.S.
FILED
OCT 3 2003
OFFICE OF THE CLERK

No. 03-127

IN THE

Supreme Court of the United States

ALVIN GLENN TAYLOR,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

Table Of Contents i
Table Of Authorities ii
Summary of the Reply Argument 1
Reply Argument 1
Conclusion 10

TABLE OF AUTHORITIES

Page

Cases:

Alabama v. Bozeman, 533 U.S. 146 (2001) .....*passim*

Apprendi v. New Jersey, 530 U.S. 466 (2000) 4

Escalanti v. Superior Court, 165 Ariz. 385, 389,n.5, 799 P.2d 5 (Ariz. Ct. App. 1990) 8

Felix v. United States, 508 A.2d 101, 106 (D.C. App. 1986) 8

Hughes v. District Court In & For City, Etc., 197 Colo. 396, 593 P.2d 702 (1979) 8

Paters v. United States, 159 F.3d 1043, 1048 n.7 (7th Cir. 1998)..... 3

Runck v. State, 497 N.W.2d 74, 81 (N.D. 1993) 8

State v. Lock, 839 S.W.2d 436 (Tenn.Ct.Crim.App. 1992). 8

United States v Umbower, 602 F.2d 754 (5th Cir. 1979)..... 8

United States v. Hicks, 283 F.3d 381 (D.C. Cir. 2002) ..4, 5

United States v. Palmer, 574 F.2d 164 (3rd Cir. 1978)..... 8

United States v. Pittman, 209 F.3d 314, 316 (4th Cir. 2000)..... 2

United States v. Saenz, 282 F.2d 354, 356 (5th Cir. 2002) .. 2

United States v. Taylor, 173 F.3d at 540-42 2

United States v. Trammel, 813 F.2d 946 (7th Cir. 1987).....9

Statutes:

28 U.S.C. § 2255 ..... *passim*

Rules:

Fed.R.Civ.P. 15(a) 2

Fed.R.Civ.P. 15(d) 4

SUMMARY OF THE REPLY ARGUMENT

The Petitioner's motion brought pursuant to 28 U.S.C. Section 2255 was properly amended, and the Government waived any objection to the amendment. The amendment was not a second or successive petition. An error in enforcing a statutory right should be evaluated in view of the result that would have obtained if the right had been properly applied in order to determine whether there has been a fundamental defect. Sentencing provides a bright line between those who are serving a sentence and those who are not; whether the place of confinement is called a jail or a prison is irrelevant. The exact same "policy" arguments that were made in *Alabama v. Bozeman*, 533 U.S. 146 (2001), to exempt brief shuttling are those that have been resurrected in claiming that a sentence does not begin until one is transferred to a place called a prison. This Court held in *Bozeman* that the clear language of the statute must be applied literally, and this Court must grant certiorari and apply that same logic to the present case, or lower courts will continue to invent alleged exceptions to prevent implementation of the Interstate Agreement on Detainers simply because they do not like the results of the plain language of the statute. Finally, there is a split in interpretation among various jurisdictions that could be resolved if this Court grants certiorari.

REPLY ARGUMENT

The Respondent's Brief goes to great lengths to claim a procedural default on the part of the Petitioner in the filing of his Section 2255 motion. In so doing, the Respondent implicitly acknowledges the strength of the Petitioner's sub-

stantive claim that the Interstate Agreement on Detainers (IAD) was violated. Nevertheless, Respondent's efforts must fail for several reasons.

First, the District Court permitted the Petitioner to amend, and such a decision can only be reviewed for an abuse of discretion. This situation is the mirror image of the cases cited by the Respondent in which a court's denial of an amendment was at issue. *See, e.g. United States v. Saenz*, 282 F.3d 354, 356 (5th Cir. 2002) ("We review for abuse of discretion a district court's decision concerning amendment of pleadings."); *United States v. Pittman*, 209 F.3d 314, 316 (4th Cir. 2000) ("We review the denial of a motion to amend a pleading for abuse of discretion.").

Second, there had been no response to Petitioner's initial Section 2255 motion at the time of the amendment. The Rules of Civil Procedure allow one to "amend the party's pleading once as a matter of course at any time before a responsive pleading is served." Fed. R. Civ. P. 15(a).

Moreover, this is the first time that Respondent has objected to the amendment on procedural grounds. The District Court stated:

> Ordinarily, this Court would not permit defendant to amend his § 2255 motion to assert this additional claim. Taylor's original § 2255 motion was filed only one day before the expiration of the one-year statute of limitations. Morever [sic], because this issue was litigated on direct appeal, *United States v. Taylor*, 173 F.3d at 540-42, § 2255

> relief is not available on this claim in the absence of extraordinary circumstances. *See supra* p. 4.
>
> In this case, however, this claim may not be summarily dismissed because Taylor is relying on a new Supreme Court decision Interstate Agreement on Detainers, *Alabama v. Bozeman*, 531 U.S. 1051 (2001), that was unavailable to him on direct appeal or when he filed his § 2255 motion. Accordingly, this claim merits a response from the Government.

Order Granting Motion to Proceed *In Forma Pauperis*, Order Denying in Part Motion Under 28 U.S.C. § 2255, Order Certifying Appeal not Taken in Good Faith, and Order to Respond to Remaining Claim, filed Sept. 13, 2001 in Cv. No. 00-3062-Ml/V & Cr. No. 96-20037-(Tu)Ml in the United States District Court for the Western District of Tennessee, Western Division, at pp. 16-17.[1] Normally, an affirmative defense such as the statute of limitations must be raised as soon as possible in order that it not be waived. *See, e.g.* Fed. R. Civ. P. 8(c) ("In pleading to a preceding pleading, a party shall set forth affirmatively . . . statute of limitations . . . and any other matter constituting an avoidance or affirmative defense"). *See also*, *Paters v. United States*, 159 F. 3d 1043, 1048 n.7 (7th Cir. 1998) ("since the government has not chal-

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[1]Petitioner did not include this Order in the appendix to his Petition for Certiorari because it did not appear to be relevant. Since the Respondent has raised this issue, the Order would presumably be included in the Joint Appendix if certiorari is granted.

lenged the court's order requiring an answer, the issue is waived").

The Respondent's Brief also tries to characterize the amendment of the Section 2255 motion "as a second Section 2255 motion" which must be authorized by the appropriate court of appeals prior to filing. Respondent's Brief at 12. This also is the first time that this objection has been raised by the Government, and it also must fail. In *United States v. Hicks*, 283 F.3d 381 (D.C. Cir. 2002), the court explained the difference between an amendment and a supplemental pleading, and the same distinction should apply to an amendment and a successive petition. Hicks had moved the court to add a claim to his pending Section 2255 motion incorporating the holding of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), which had been released while his motion was still pending. The D.C. Circuit stated:

> [W]e believe that Hicks' motion seeking to add an *Apprendi* claim to his pending § 2255 request is better understood as an amendment than as a supplemental pleading. The distinguishing feature of the latter is that it sets forth "transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented." Fed. R. Civ. P. 15(d). . . Supplements therefore contrast with amendments, which typically rest on matters in place prior to the filing of the original pleading.
>
> The question in this case is whether intervening judicial decisions are the sort of "occurrences or

> events" to which Rule 15(d) refers. We think not. The purposes to which the rule is typically put support the conclusion that the appropriate bases for supplemental pleadings are new facts bearing on the relationship between the parties, rather than merely changes in the law governing those facts.

United States v. Hicks, 283 F.3d 381, 385-386 (D.C. Cir. 2002) (some citations omitted). Therefore, Petitioner was properly allowed to amend his petition and was not required to receive prior approval of the appellate court as would have been required for a second petition.

Petitioner's amendment, besides being allowed at the discretion of the trial court, was timely filed because it was brought within one year of "the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed." 28 U.S.C. § 2255. Certainly, there was an impediment created by the failure of the government to enforce literally a law of the United States, namely, the IAD. However, as noted by the district court, the Petitioner had fully litigated this issue on direct appeal and had lost and was consequently barred from raising the issue again under Section 2255. In other words, the Government, which is so leery of enforcing the technicalities of the IAD when it comes to its own actions, is delighted to crow about the technicalities of Section 2255 because it thinks that those technicalities place the Petitioner in a "catch-22" in which he is prevented from raising an issue in an initial filing and then prevented by a time limitation from raising it on amendment when this

Court has vindicated his original position. Under the demands of justice, this cannot be so! This Court issued the *Bozeman* opinion while Petitioner's Section 2255 motion was still pending, and Petitioner had one year or until such time as the trial court ruled upon the motion, whichever was shorter, to amend his motion. He amended before the trial court had ruled, before the Government had responded, and before a year from the issuance of the *Bozeman* opinion had expired.

The Respondent also asserts that Petitioner's IAD claim is not cognizable on a Section 2255 motion. The Petitioner urges the Court to recognize that the proper standard for determining whether there has been a "fundamental defect" for purposes of Section 2255 review is not whether the law violated is "technical" (many laws, and certainly the IAD are very technical), but rather the inquiry should be whether a significantly different result would have occurred if the law had been implemented. In the present case, the required dismissal of the indictment is an enormous difference which makes the failure to enforce the plain language of the IAD a fundamental defect that does permit review under Section 2255.

The Respondent attempts to gloss over whether *Bozeman* requires a literal enforcement of the IAD by claiming that one begins serving a sentence of imprisonment not when the sentence is pronounced but at some later indeterminate time when one is transferred to something called a prison. The cases cited by the Respondent all bring out the "policy" reasons stating that the reason for the anti-shuttling clause is not

clause is not to impede rehabilitation and that the prisoner will not have started any rehabilitation programs as long as he is still in jail. This is exactly the same argument that was made in *Bozeman* when it was argued that shuttling for a brief stay would not interrupt rehabilitation, and this Court soundly rejected that argument in favor of a strict interpretation of the plain language of the statute. The literal interpretation required since *Bozeman* does mandate reversal of the jail versus prison distinction that has been imposed on the Petitioner; because the plain language of the IAD gives it effect, the IAD cannot have nuanced meanings added to its terms. Nevertheless, the contortions that the courts have gone to in order to avoid the plain language of the IAD make it necessary that this Court speak again as it did in *Bozeman*.[2] Without clear direction from this Court, the lower courts will continue to pretend to find other "exceptions" to the IAD that "the *Bozeman* decision did not touch upon."

Finally, the Respondent's Brief suggests that the issue is not worthy of being granted certiorari because there is an insignificant split in interpretation of the jail or prison issue and that only "two state courts of last resort have reached"

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[2]One is reminded of St. Thomas Aquinas' commentary on why laws must be enforced: "Ad primum ergo dicendum quod homines bene dispositi melius inducuntur ad virtutem monitionibus voluntariis quam coactione, sed quidam male dispositi non ducuntur ad virtutem nisi cogantur." *Summa Theologiae*, I^a-II^{ae} q. 95 a. 1 ad 1. Many lower courts have such a reluctance to enforce the IAD that they will never do so unless they are coerced; *Bozeman* was evidently not enough to induce these recalcitrants to do what is right.

the conclusion that the IAD applies to a sentenced prisoner who is temporarily housed in a jail. Respondent's Brief at 15. As a preliminary matter, if the interpretation that the IAD does not apply to a sentenced prisoner in a jail is incorrect, it should not matter whether any jurisdictions accept a contrary view. However, it should be noted that the split among jurisdictions is greater than just those in which a court of last resort has ruled on the issue. *See, e.g., Escalanti v. Superior Court*, 165 Ariz. 385, 799 P.2d 5 (Ariz. Ct. App. 1990), and *State v. Lock*, 839 S.W.2d 436 (Tenn. Ct. Crim. App. 1992), in addition to *Felix v. United States*, 508 A.2d 101 (D.C. Ct. App. 1986), and *Hughes v. District Court*, 197 Colo. 396, 593 P.2d 702 (1979). *Cf. Runck v. State*, 497 N.W.2d 74, 81 (N.D. 1993) (rejecting a blanket interpretation that would never make the protections of the IAD applicable to sentenced prisoners being held in a jail). The idea that the IAD applies to sentenced prisoners in jails is also not unknown among the circuit courts of appeal. In *United States v. Palmer*, 574 F.2d 164 (3rd Cir. 1978), the defendant had been shuttled from the Erie County Jail where he was serving a state sentence. The opinion noted that "[t]he parties do not dispute that a violation of the IAD in fact took place," but the Third Circuit held that Palmer had waived his IAD claim by pleading guilty before filing a motion to dismiss based on the IAD shuttling violation. In *United States v. Umbower*, 602 F.2d 754 (5th Cir. 1979), the defendant was incarcerated in the Bucks County Jail serving a probation violation on a state sentence. He had detainers lodged against him by the Southern District of Florida and by the State of New Jersey. For some reason, the defendant was

brought to before a magistrate in the Eastern District of Pennsylvania and then returned to the jail. The Fifth Circuit seemed to presume that this would have been shuttling but for the fact that the defendant had never arrived in the jurisdiction that had authority to resolve his detainer. In *United States v. Trammel*, 813 F.2d 946 (7th Cir. 1987), the defendant was in the Milwaukee House of Corrections, a county facility, pending his transfer to a Wisconsin state prison, when he was brought to federal court and returned pursuant to a writ of *habeas corpus ad prosequendum*. The Seventh Circuit found this not to be shuttling, not because the defendant was in a jail, but rather because a detainer had not been lodged until a week after the transfer. In short, there is a significant split among the various jurisdictions that requires resolution by this Court.

CONCLUSION

There was no procedural default and the petition for a writ of certiorari should be granted in order to resolve the questions presented for review.

Respectfully submitted,

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